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NO. 83-6390

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

TERRELL M. JOHNSON
Petitioner,

vs.

STATE OF FLORIDA
Respondent.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

WHETHER CERTIORARI SHOULD BE GRANTED FOR THE PURPOSE OF MAKING DE NOVO FINDING OF FACT OR FOR PERMITTING THIS HONORABLE COURT TO DRAFT NEW STATE STATUTES AND PROCEDURAL RULES IN AN AREA NOT GOVERNED BY ANY FEDERAL OR CONSTITUTIONAL REQUIREMENT.

II.

WHETHER CERTIORARI SHOULD BE GRANTED IN THE FACE OF PROCEDURAL DEFAULT, OR WHERE NO DEVIATION OF ANY FEDERAL OR CONSTITUTIONAL STANDARD WAS COMMITTED BUT THE PETITIONER MERELY DISLIKES THE OUTCOME OF THE CASE.

III.

WHETHER CERTIORARI SHOULD BE GRANTED TO REVIEW STATE COURT RULINGS APPLYING STATE LAW.

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OPINION BELOW

The Petitioner's statement is accepted.

JURISDICTION

The petition at bar is presented pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's statement is accepted.

STATEMENT OF THE CASE

Terrell Johnson has raised three arguments in support of his quest for certiorari. For the convenience of the court a general outline of the case is presented, followed by the facts relevant to each claim.

Terrell Johnson was indicted on two counts of murder in the first degree for the execution style killings of James Dodson and Charles Himes (R 625). Terrell Johnson gave seven different confessions of a varying exculpatory nature (R 210-212, 235-36, 243,253,351-52). Johnson's initial confession was to the effect that he pawned a gun with James Dodson (a bartender) for fifty ($50.00) dollars, but Dodson demanded one hundred ($100.00) dollars for its return (R 210-211). Dodson argeed to let Johnson "test fire" the gun to make sure it still worked. Johnson proceeded to rob Dodson with the gun (R 210-11). After getting cash and a gun from Dodson, Johnson marched Dodson and a bar customer, Mr. Himes, back to the mens room. Johnson had them lay on their stomachs and he opened fire (R 211). Johnson returned to the bar and wiped it clean to eliminate fingerprints, but heard movement in the bathroom (R 211). Returning to the bathroom Johnson found Himes, a potential witness, still alive (R 211). Johnson finished him off (R 211).

In later statements Johnson added such details as the customer "lunging" at him (R 280) and "lack of intent."

The physical evidence showed that Johnson fired up to eight shots, meaning that he emptied and reloaded his six shot revolver (R 286). This belied any "shooting frenzy" story.

A. TRIAL TRANSCRIPTS

Johnson's trial was transcribed by Mrs. Wheeler, a vetern court reporter (T-157). After the trial, Wheeler's stenographic tapes were phonetically typed out by Beth McArthur (R 158). An error in the court reporter's office resulted in the rough draft of the trial transcript being sent to the Florida Supreme Court before Mrs. Wheeler could proof read it (T 159, 165-66).[1] Like any rough draft, the transcripts were replete with typographical errors, and on motion of defense counsel, were returned to Mrs. Wheeler for correction pursuant to Fla. R. App. P. 9.200(f) (T 166). Pursuant to the rule, Mrs. Wheeler consulted the trial judge (Judge Powell) defense counsel (Mr. Jones) and the prosecutor (Mr. Hinshelwood) (T 153).

Johnson challenged the ability of the court reporter and trial participants to correct the transcripts, prompting extended evidentiary hearings from March until July of 1982. In addition, Terrell Johnson gave a deposition (App. 1) and a purported memory expert gave a deposition. The evidence adduced at these hearings was:

> (a) Terrell Johnson read the transcripts and found them substantially correct. (App.1-13) Only spelling or similar errors were noted.
>
> (b) Defense counsel, Mr. Jones, (who also drafted the statement of appealable issues) found the transcripts substantially correct and could not state any "point on appeal" that was "lost" due to some omission in the transcripts (T 128-137).
>
> (c) The trial judge, like the others, found some grammatical and spelling errors, but found the transcripts correct (T 48-49).
>
> (d) The memory expert testified

---

[1] References to the remand proceedings will be cited as (T page number) since these transcripts pages are not incorporated into the record by page number.

> that, for bystanders, memories fade substantially. For trial participants such as the Judge and lawyers who prepared the trial, her theory would not apply to nearly the same extent. (Deposition, Loftus T-17-30).

Having been through extensive hearings, the judge (on remand) closely questioned the Petitioner's appellate counsel regarding any appellate issue which he felt could not be argued due to the condition of the corrected transcripts (T 1671-1681). Counsel could not provide even one.

Judge Baker observed:

> "But Jerry Jones, and Judge Powell, and Hinshelwood, who were at these bench conferences, have not told me, not a single one of them has given me a bench conference that had anything to do with the trial that was not reported and not reported accurately." (T 1673)

> ". . .I'm saying, I have read the transcript, I've taken notes on it, I have listened to the witnesses testify about it, I have listened to the Judge, the prosecutor, the Defense counsel, the defendant, the court reporter, and nobody has told me of any single significant error in it, or not one single thing that was left out of the record that ought to be in there." (T 1679-80).

These findings were reflected in Judge Baker's written order (App. 2-4). which concluded:

> "Not even one prejudicial error or omission was shown. Neither defendant nor his counsel has offered even me correction or addition to the transcript after it was proofread and corrected by the court reporter." (App. 14-16).

These findings were adopted by the Supreme Court of Florida in Johnson v. State, 442 So.2d 193, 195 (Fla. 1983).

Johnson did, in fact, file a ten point appellate brief, fully arguing all conceiveable issues.

B. WITHERSPOON FACTS

No general Witherspoon inquiry was conducted by the judge, to the panel. All questioning was done on an individual basis (R 41). As a result of these direct queries, venirewomen Horne and Bowman were discharged as biased against capital punishment. Five other veniremen were discharged as biased in favor of capital punishment (R 188, 228, 253, 296, 303).

One juror, Mrs. Connally, was seated as a juror despite saying she would be "very hesitant" to impose a sentence of death (R 284).

The colloquoy with (excused) venirewoman Horne went like this:

> MR. SMALL: Could you, irrespective of how anyone else felt about it, could you yourself recommend the death penalty?
>
> MRS. HORNE: I don't think I could.
>
> THE COURT: ". . even though the jury reached a first degree verdict, would you automatically recommend life?
>
> MRS. HORNE: Yes, probably.
>
> THE COURT: You would?
>
> MRS. HORNE: (nodded in the affirmative). (p.22 App. 17-23).

Mrs. Bowman was the wife of a minister who was opposed to capital punishment (R 442). The Johnson trial was preventing her from leading a thirty-six person religious retreat (R 358).

The exchange with Mrs. Bowman went like this:

> MR. JONES: Would you be able to remove your personal feelings and follow the law the judge will give you as to what matters you are to consider?
>
> MRS. BOWMAN: I think that is a hard question. I don't think I quite understand what you are saying.
>
> MR. JONES: What I'm trying to say,

everyone has personal feelings. Do you feel your personal feelings would interfere with your following the law?

MRS. BOWMAN: In other words, I see. Okay. I don't think I would want to be responsible for a person's death.

MR. JONES: No one wants that, but we are asking you if you would be able to remove your personal feelings and follow the law even to the extent, if the law, according to what the judge would give you, would require you to return an advisory sentence of death?

MRS. BOWMAN: I honestly don't think I can answer that.

MR. JONES: Well, no one else can answer it for you, so?

MRS. BOWMAN: Well, I'm trying to say, I don't think I would do that. (R 1321-1322).

It must be noted that trial counsel never objected to any finding of bias. Counsel agreed that Mrs. Horne and Mrs. Bowman were biased, but claimed entitlement to them as part of a "cross section of the community". (App. 17-23).

C. THE BALLISTICS TEST

The state called an evidence technician named Parker as a witness. Parker test fired Johnson's gun at a white sheet of paper (R 100). The paper was admitted but Parker, who was not qualified as an expert witness, never interpreted the test (R 104).

No other witness testified about the paper or even mentioned it.

The admission of the paper was appealed as a violation of the Florida Evidence Code, without success. See Johnson v. State, 442 So.2d 193 (Fla. 1983). No federal issue was argued or discussed in the opinion.

SUMMARY OF ARGUMENT

The Petitioner is not entitled to certiorari review, Mr. Johnson's petition is a request for de novo factual assessments, Supreme Court rulings overturning state court decisions applying state law, legislation of new procedural and substantive state law that is not constitutionally based, and general review of a claimed "Witherspoon" error despite full compliance with federal guidelines and a dearth of demonstrable error or bias.

ARGUMENT

I

THE PETITIONER IS NOT ENTITLED TO DE NOVO FACTUAL DETERMINATIONS, OR TO THE CREATION OF NEW STATE PROCEDURAL RULES BY THIS COURT.

This case was remanded pursuant to the established procedures of Florida Rule of Appellate Procedure 9.200(f) for correction of the rough draft of the record. As it turned out, extensive hearings were conducted regarding the sufficiency of the transcripts, which led to Judge Baker's written order that, in turn, was adopted by the Supreme Court of Florida.

Since this case has already been remanded for intense scrutiny of the record(and factual findings have been made) there exists no reason for granting certiorari just to make de novo findings of fact. Sumner v. Mata, 449 U.S. 539 (1981); Mobil Oil Corp. v. F.P.C., 417 U.S. 283 (1974); United States v. Johnston, 268 U.S. 220 (1925). Indeed, such is not the practice of this Court. Certiorari should be denied on this basis alone, but additional reasons for denying certiorari exist.

First, there is no federal or constitutional requirement for prisoners to receive verbatim, perfect, transcripts. Griffin v. Illinois, 351 U.S. 12 (1956), Mayer v. Chicago, 404 U.S. 189 (1971).

The Griffin court stated that all persons should have equal access to records on appeal, but left the nature or form of that record up to the states. Florida requires appellants to submit records that are sufficient to apprise the reviewing court of the issues on appeal. See Fla. R. App. P. 9.140, 9.200 . The record may utilize complete or partial transcripts or stipulated statements of fact (Fla. R. App. P. 9.200). If errors are found, the parties and the trial judge can convene and correct the record. Fla. R. App. P. 9.200(f). As the

Florida Supreme Court implied in Johnson v. State, 442 So.2d 193 (1983), a new trial can be ordered to preserve an appellant's rights.

The Petitioner has failed to establish any legal, not to mention constitional, right to perfect transcripts. Indeed, even in the federal system, no such right is recognized. United States v. Long, 419 F.2d 91 (5th Cir. 1969); Strauss v. United States, 311 F.2d 926 (5th Cir. 1963).

Petitioner cited the case of United States v.Selva, 559 F.2d 1303 (5th Cir. 1977) which is not controlling. Selva dealt with a new attorney who was burdened by a bad record. Johnson has the assistance of both his trial lawyer (Jones) and appellate counsel. Johnson and Jones have both testified that the transcripts are substantially correct; and a complete appeal was taken.

Factual analyses aside, it is submitted that a Fifth Circuit opinion does not supercede a state supreme court opinion on a matter of state law. Indeed, the state court's decision is immune from federal review. Wainwright v. Sykes, 433 U.S. 72 (1977). There is no "conflict certiorari" rule providing certiorari review under these circumstances.

Finally, the Petitioner is asking this Court, absent constitutional authority, to create a per se rule of reversible error for Florida's courts regarding an "error" that is not of federal or consitutional proportions. The request is meritless and should not be considered.

ARGUMENT

II

WHEN FEDERAL QUESTIONS ARE RESOLVED IN ACCORDANCE WITH ESTABLISHED FEDERAL STANDARDS REVIEW IS UNNECESSARY ABSENT "SPECIAL AND IMPORTANT" REASONS.

The Petitioner questions the propriety of the exclusion of two death biased jurors pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968).

The trial judge, who heard and saw the venirewoman, found them unable and or unwilling to obey the law in the performance of their duties due to their feelings about capital punishment. The transcripts support his findings.

Again, pursuant to Sumner v. Mata, 449 U.S. 539 (1981), it is suggested that certiorari should not be used to reweigh and re-evaluate the testimony of these people on the basis of a cold trnascript. See Texas v. Mead, Case No. 83-791 (February 21, 1984), 34 Cr.L. 4196 (Rehnquist,J, dissent), See also McCorquodale v. Balkom, 721 F.2d 1493 (11th Cir. 1983) (en banc).

The record of this trial does not reflect a pro-death-biased jury. Bumper v. North Carolina, 391 U.S. 543 (1968). Indeed, five prosecution prone veniremen were excused and one woman with reservations about ever voting for capital punishment was specifically retained. Absent any demonstrable bias, review should not be granted. Bumper v. North Carolina, supra.

Florida's courts conducted (and on appeal reviewed) a Witherspoon inquiry and abided by federal standards. Exclusion of these potential jurors was proper. Lockett v. Ohio, 438 U.S. 586 (1978); Boulden v. Holman, 394 U.S. 478 (1969).

There exists no special or important reason to disturb the state court's factual determinations regarding the fitness of the excluded venire; none have even been

suggested. Review is simply not called for. Fay v. Noia, 372 U.S. 391 (1963).

Finally, the state submits that the Petitioner's objection at trial went to his right to biased jurors as "representative of part of a viable cross-section of the community." The actual determination of bias was never objected to, and thus procedural default precludes review. Wainwright v. Sykes, supra.

ARGUMENT

III

CERTIORARI DOES NOT EXIST TO PROVIDE REVIEW OF STATE COURT DECISIONS ON ISSUES OF STATE LAW.

The Petitioner seeks review of the Florida Supreme Court's decision regarding admission of an exhibit during trial and the impact of Section 90.401, Florida Statutes (1979).

A state court decision on state law, including the admissibility of evidence, is not a proper subject for certiorari review. Beck v. Washington, 369 U.S. 541 (1962); Wainwright v. Sykes, 433 U.S. 72 (1977). Indeed, this Honorable Court has refused to overturn state court decisions on state law even where this Court has felt it would have reached a different conclusion. Cryger v. Burke, 334 U.S. 728 (1948).

Although Johnson made a passing reference to the constitution in the table of contents of his brief to the Florida Supreme Court, Johnson never argued any federal claim to that court. In fact, he has not argued one to this Court either. Johnson's disagreement with the Florida Supreme Court's interpretation of a Florida statute is not subject to review.

These same authorities also control the Florida Supreme Court's disposition of the correction of the trial transcripts pursuant to Fla. R. App. P. 9.200(f).

The opinion of the Florida Supreme Court resolves both the transcript issue and the evidence issue on the basis of state law. Where adequate and independent state grounds exist for resolving a question, it is presumed that those grounds (and not federal grounds) form the basis for the state court's decision, and cert[illegible] will not be granted. Graham v. Harris, 267 U.S. 370 (1925).

CONCLUSION

The Petitioner has raised several claims that are not within the scope of certiorari review. First, he asks for independent, de novo, factual determinations by this Court. Then he seeks this Court's intervention on matters of state law and procedure despite the absence of any cognizable federal or constitutional claim. Next, he desires accross the board review of his "Witherspoon issue" despite any showing of error, prejudice or deviation from federal guidelines by Florida's courts. Finally, he asks this Court to legislate new Florida procedural rules and a new Florida statute providing per-se appellate reversals.

None of these requests qualify for, or warrant, certiorari.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

NO. 83-6390

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

TERRELL M. JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondents.

CERTFICATE OF SERVICE

I, MARK C. MENSER, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Response to Petition for Writ of Certiorari to the Supreme Court of Florida, Brief for Respondent in Opposition, by depositing same in the United States mail, first class postage prepaid, as follows:

Ronald M. Zimmet
Chief Assistant Public Defender
1012 S. Ridgewood Avenue
Daytona Beach, Fl 32014-6183

All parties required to be served have been served on this 6th day of April, 1984.

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COUNSEL FOR RESPONDENT

NO. 83-6390

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

TERRELL M. JOHNSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S APPENDIX

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA.

CASE NO. CR-80-101

STATE OF FLORIDA,

Plaintiff,

vs.

TERRELL M. JOHNSON,

Defendant.

_____/

DEPOSITION OF TERRELL M. JOHNSON

Pursuant to due notice, the deposition of TERRELL M. JOHNSON was taken by Ronald K. Zimmet, Esquire, Chief Assistant Public Defender, on July 1, 1982, commencing at 2:30 p.m., at Florida State Prison, Starke, Florida, in the presence of Rhonda D. Washburn, Court Reporter and Notary Public, State of Florida at Large.

APPEARANCES:

RONALD K. ZIMMET, ESQUIRE and BRIAN HANSON, ESQUIRE, Chief Assistant Public Defender, Fifth District Court of Appeal, 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014-6183.

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(Thereupon, TERRELL W. JOHNSON, having been first duly sworn, testified as follows:)

DIRECT EXAMINATION

BY MR. ZIMMET:

Q. For the record, would you state your name, please?

A. My name is Terrell W. Johnson.

Q. Are you the Terrell Johnson who has been charged in the case of the State of Florida versus Terrell Johnson, Orange County Case No. CR-80-101?

A. Yes, I am.

Q. Okay. Mr. Johnson, have you read the second version of the transcripts of your trial?

A. Yes, I have.

Q. Okay. And have you done that at my request?

A. Yes, I have.

Q. And have you made some notes of some discrepancies and some problems that you've seen in that second version of the trial transcript?

A. Yes, I did.

Q. Let me show you a piece of paper now. Are these those notes?

A. Yes, they are.

Q. Okay. And that's what's listed as Attachment "C" to a document which I submitted on your behalf to the Court

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entitled Objections to the Resubmitted Transcript. And we have here also, so the record will be clear, the second version of the trial transcript as submitted by Rose Wheeler, the court reporter. And what we'll be doing is taking a look at your notes and asking you to explain what those notes are, as to what problems you see with the transcript. Why don't we just start right from the beginning with Item No. 1, if you could explain that.

A. That would be page 22, lines 24 and 25.

Q. Okay. I wondered if maybe you meant page 23 and wrote down page 22?

A. I meant page 23, lines 2 and 3. He states, "Well, the light was on. There is no door. There is an opening that goes into the men's room and there is no door on it." And then further down on page 23, he states -- page 9 and 10, he states, "I went back to see if there were -- back in the bathroom and when I went back, I opened up the door and there they both laid on the floor."

Q. And what's the problem that you see there?

A. Well, he states up here on lines 2 and 3 that there was no door and then down there on lines 9 and 10, he states there was a door.

Q. Okay. And then the next item which you have marked?

A. Would be page 28.

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Q. Okay. Now, we're referring to page 29 of the trial transcript, the second version.

A. On page 29, lines 10 and 11 -- I wish we had the incorrected one, because it wasn't stated like that. "Is that the door behind the bar -- looked on December the 4th?" See, it wasn't corrected. It wasn't like that when I read it. I read the old one.

Q. Okay. Do you see a problem with that at this point?

A. I don't see that much of a problem now; but when I first read it, I did. I see that they've corrected or marked out a word on the transcript.

Q. Okay. What's your next point that you've got down there?

A. Check exhibits numbers to see if they match up with photos.

Q. Okay. That's not with regards to the transcript. Do you think maybe we could move, then, on to your No. 4 there, page 33?

A. Page 33. Lines 14 and 15 is an incorrected word. It says, "Did they take one or more of the bodies from the bathroom and put it on the floor there at the bar?"

Q. Okay.

A. And "there" is incorrected.

Q. Okay. What's your next problem area? Page 34?

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A. Yes, 34.

Q. Okay.

A. See, it's all changed from the old transcript. She didn't have none of this in here.

Q. Okay. Now, essentially, what you've got here is a Xeroxed copy of the old transcript; and these new words that have been written in are her corrections. So, presumably, this should be exactly the same.

A. Okay.

Q. On page 34, what problem area do you see?

A. On 11 and 13, I don't know what they talked about. Oh, that's why. It's a bench conference. They know what they talked about.

Q. Okay. You mean by that the bench conference is omitted?

A. Right, it's omitted.

Q. Okay. Then, page 37 is your next one?

A. Yeah, 37. Now, they're talking about the medical examiner and they're asking him, "Are you in any way Board certified on the American Board of Pathology?" "I am eligible." And that's all. He's eligible; but he's not on the Board or certified. And that's what I wanted to bring out.

Q. Okay. Do you think that's a problem with the transcript? Do you have any recollection of what it was

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that he said?

A. No, I don't.

Q. Do you think he may have said that he was certified? Or do you have enough memory to --

A. No, I don't.

Q. Okay.

A. I just wanted to bring that out, that they asked him that question, whether he's certified or not. And he says he was eligible.

Q. Okay. And let's see, the next page, page 43?

A. Right. Okay. I didn't understand this 19 and 20 line, "The bullet was placed into evidence, into the POL evidence," whatever that means.

Q. Okay.

A. And then also on lines 23 -- 22 and 23. "This was given through our investigator to the P -- blank -- I think Mr. Brooks." Oh, wait a minute. All right. I didn't understand that line either.

Q. Okay. That's line 22?

A. Right.

Q. Of page 43?

A. Right.

Q. Then on page 48, is there a problem there?

A. Okay. Lines 10, 11 and 12 -- 9, 10, 11 and 12. "Did you recover? You have told us you recovered? Did you

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recover any others?" Well, I didn't understand what they were talking about. What did they recover?

Q. Okay. And the next one, page 49?

A. Right. Okay. Lines 7 and 8. "Do you recall especially who you gave it to?" "I think Mr. Brooks." And then he states on page 50, he gave it to Mr. Parks.

Q. Okay. Are you able to remember what it was that he said, whether the person said he gave it to Mr. Brooks or whether the person said he gave it to Mr. Parks?

A. No, I'm not.

Q. Do you remember whether or not he said both?

A. No, I'm not.

Q. Okay. All right. Then the next indication is page 55?

A. Okay. I didn't understand the question. "THE COURT: Let me clear up something in my mind. Doctor, you have previously identified Exhibit E as the projectile, did you not, earlier in the testimony?" "Yes, sir." That don't sound right now. I didn't know what Exhibit E was. That's what my problem was. I couldn't figure out what the exhibits were, how they were numbered or anything else.

Q. Okay. Is there anything further there that you should bring out?

A. Page 56, 1 and 2.

Q. I think page 56, is it not just a continuation of

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that question you've noted on page 55?

A. Right.

Q. Okay. Then page 58 would be the next problem area?

A. Right. Let's see. Line 7 and 8, "(Whereupon, counsel approached the bench, out of the hearing of the court reporter and jury; whereupon, the following was had in the presence of the Court and jury:)" Now, I didn't understand what the bench conference was about.

Q. Okay. Do you have any memory of what happened at those bench conferences?

A. No. I don't.

Q. Did you go up to the bench when there were bench conferences?

A. No.

Q. Did your lawyer go up for you?

A. Yes.

Q. But you were not there yourself?

A. No.

Q. Okay. All right. What is the next problem area, then? Page 110?

A. Yes. Here again, we have lines 1 through 15. I didn't understand because -- I'll read it. "(Whereupon, counsel approached the bench and conferred out of the hearing of the jury.)" I didn't understand what the conference was

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about.

Line 3, "MR. HINSHELWOOD: Answer is that in fact there is a pattern pistol." I didn't understand that line.

And I don't understand line 5, "THE COURT: But where are you going with that?"

And then line 6, Mr. Hinshelwood says, "Based on -- " and "THE COURT: "Based on the Court -- up against the wall and fire with it." And Mr. Hinshelwood said "Yes."

Q. And you were not present during that bench conference either; were you?"

A. No.

Q. You were seated at the table?

A. Right.

Q. Okay. The next --

A. I just didn't understand none of that. I see now that they've got correct words added to it now. But when I first read it, they didn't have that.

Q. Okay. Now, on page 336, is that the next area?

A. 336. yes. "What happened on September 29th?" That was the question I had written down.

Q. Okay. You're indicating that we have an indication in the last sentence that the trial resumed --

A. "(Whereupon, the trial recessed at 11:00 p.m. o'clock, to resume September 29, 1980, at 9:30 a.m. o'clock.)" What happened on September the 29th?

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Q. Okay. And then the next problem area is page 192?

A. Page 192.

Q. Lines 9 and 10.

A. Okay. "THE COURT: As to Exhibits A and C, which are each a photograph of each victim, the State Attorney has offered those. The objection of counsel is not as to admission, but as to publication to the jury."

Then on page 192, 18 and 19, my question is "What was the exhibit they were talking about on 18 and 19?" "THE COURT: Madam Clerk, B and C will be admitted as next-numbered."

Q. Okay. So, am I correct that the distinction you're drawing is that on page 192, lines 9 and 10, they're talking about Exhibits A and C; and the transcript goes down, on page -- excuse me -- on line 18, page 192, and talk about B and C?

A. B and C.

Q. Okay. Have you read the Voir Dire?

A. Yes. I have.

Q. Are you able to recall that in sufficient detail to be able to point out any problem areas?

A. No, I have not.

Q. Are you able to recall the trial as a whole in enough to be able to make corrections on a word-for-word basis?

App. H

A. No, I'm not.

Q. Okay. How about your ability to remember the gist of what people said? Are you able to recall that enough?

A. Now, I can recall parts of it. Like I remember one juror coming up and talking to the judge and explaining to the judge that he wanted to be -- didn't want to be a juror. In fact, he broke down and started crying because he was ashamed to admit that he had only had a fifth or sixth grade education; and he'd never told that to anybody else but the judge; and he was ashamed about it. And I remember at the close of the trial, the jurors on several times asked the judge for information; and he refused to send it in to them. I can remember that. Other than that, that's about all I remember. Except, I do remember bench conferences that they had and I don't remember what they were, because I wasn't present.

MR. ZIMMET: Okay. I don't have any more questions. That's it.

(Thereupon, the deposition was concluded at 3:00 p.m.)

- - - - -

App. 12

STATE OF FLORIDA :

COUNTY OF ALACHUA :

I, Rhonda D. Mashburn, Court Reporter and Notary Public, State of Florida at Large, do hereby certify that I was present at the foregoing deposition and that the witness, Terrell M. Johnson, was first duly sworn by me to testify the whole truth; that the foregoing deposition given by said witness was reported by me in Stenograph and by mechanical recording; and that the foregoing pages, numbered 1 through 12, inclusive, constitute a true and accurate transcription of my report of said proceedings.

I further certify that said deposition was taken on July 1, 1982, commencing at 2:30 p.m. at Florida State Prison, Starke, Florida, and was completed on that same date.

I further certify that I am neither attorney nor counsel of record for any of the parties, nor am I related to or an employee of the parties, nor am I financially interested in the event of this cause.

IN WITNESS WHEREOF, I have hereunto affixed my hand and official seal in the county and state aforesaid, this 7th day of July, A.D., 1982.

My Notary Comm.
Exp. 2/10/85.

Rhonda D. Mashburn
ALACHUA REPORTERS
114 S.E. First Street
Gainesville, Florida 32601
904-375-1512

App. 13

IN THE SUPREME COURT OF FLORIDA

TERRELL M. JOHNSON,

Appellant.

vs. CASE NO. 59,811

STATE OF FLORIDA,

Appellee.

RECEIVED
SEP 21 1982
ATTORNEY GENERAL
DAYTONA BEACH, FLA

ORDER ON REMAND FOR RECONSTRUCTION AND SUPPLEMENTATION OF THE RECORD

The Supreme Court of Florida directed this court to hold an "evidentiary hearing for the purpose of supplementing and reconstructing the record on appeal". In compliance with that order several hearings were held for evidence and argument regarding the transcript of the trial proceedings. The entire transcript was read and commented upon by the prosecutor, defense counsel and judge at the trial as well as the court reporter who reported the trial and made the transcript. The undersigned judge also read the entire transcript.

Everyone involved admitted that the transcript when originally submitted to the supreme court contained a number of errors. The court reporter explained that the transcript had been sent to the supreme court by mistake before the court reporter had proofread it. When the transcript was returned to her, the court reporter proofread and corrected it by hand-written corrections. In the course of her correcting the transcript the court reporter met briefly with the trial judge, the prosecutor and defense counsel. That meeting does not appear to have affected the correcting of the transcript.

The trial itself was short, and the evidence was not complicated. The judge and the attorneys in the case could indicate no significant or material fault in the corrected transcript. What corrections they offered, if accepted, would

not materially change the transcript. No relevant or substantial errors or omissions were revealed by the witnesses or even appellate counsel that would prejudice Johnson's appeal.

A number of bench conferences were not recorded, because no one requested the court reporter to record them. This is quite common during a trial. There is no indication of relevant arguments or objections going unreported in the transcript.

The deposition of defendant, Terrell Johnson, taken at Florida State Prison fails to recite any error of significance in the trial transcripts.

The "expert testimony" of Dr. Elizabeth Loftus is nothing more than what common sense tells us: memories fade over time, and the ability to correctly remember events can be enhanced by being reminded of certain things about the events to be recalled.

The "suspected errors" and "errors suspected from the context" raised by defense counsel turn out to be few, isolated instances in the record that, in context, are not any more unusual than other records of human dialogue. Not even one prejudicial error or omission was shown. Neither defendant nor his counsel has offered even one correction or addition to the transcript after it was proofread and corrected by the court reporter.

Wherefore, it is ordered and adjudged:

1. The motion to permit Terrell Johnson to attend these reconstruction hearings is DENIED.

2. The motion for transcription of Rose Wheeler's tapes by an independent court reporter is DENIED.

3. The motions to supplement the records of this proceeding with the depositions of Dr. Luftus and Terrell Johnson, and with the original stenographic tapes of the trial, are GRANTED.

4. The stenographic notes of Johnson's trial are to be preserved in the evidence storage room in the Orange County Courthouse, and under no circumstances are to ever be destroyed or returned to the court reporter.

5. All records, exhibits and transcripts from these hearings (except the stenographic tapes) are to be transmitted to the Supreme Court of Florida along with the trial transcripts, including the transcripts as originally submitted and as corrected.

6. The voir dire transcripts and trial transcripts, are to be sent to the Supreme Court of Florida without further or additional corrections or changes, forthwith.

7. No Motion for rehearing or reconsideration shall be entertained.

DONE AND ORDERED in Orange County, Florida, this 30th day of September, 1982.

Joseph P. Baker, Circuit Judge

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail/hand to the following:

Office of the State Attorney, 250 N. Orange Ave., Suite 400, Orlando 32801; Office of the Attorney General, 125 S. Ridgewood Ave., Daytona Bch., FL 32015; Ronald Zimmet, Assistant Public Defender, 1012 S. Ridgewood Ave., Daytona Bch., FL 32014.

THE COURT: We will take a short recess. When everybody gets back, we will keep going.

(Whereupon, the trial recessed at 4:40 to resume shortly.)

(Whereupon, the trial resumed at 4:45 p.m. o'clock.)

THE COURT: Now, gentlemen, here is what I propose to do after we complete the examination with Ms. Horne. I think, what I am going to do is bring in the back row and excuse them until 10:00 o'clock. It is taking us six, seven minutes per juror and it will take us an hour to complete this middle row. That will put us about 5:30, a quarter to 6:00. I don't want to work much past that.

Anybody final problems with that?

MR. JONES: No.

MR. SMALL: No, sir.

(Whereupon, the Juror, Ms. Horne, entered the courtroom.)

THE COURT: Ma'am, you are Ms. Horne?

MS. HORNE: Yes.

THE COURT: Ma'am, have you heard, read, listened to any news accounts about this case?

MS. HORNE: Not that I know of.

THE COURT: Have you heard anybody talking about the case?

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MS. HORNE: (Nodded in the negative.)

THE COURT: All you know about it is what you heard today?

MS. HORNE: Right.

THE COURT: Do you hold any religious beliefs against the death penalty?

MS. HORNE: I am not in favor of it.

THE COURT: What do you mean by that?

MS. HORNE: I guess I do hold religious beliefs.

THE COURT: What is your religion?

MS. HORNE: I am a Baptist.

THE COURT: Let me ask you this question. Because of the beliefs which you say you hold about the death penalty, would you automatically vote against it no matter what the facts and circumstances are?

MS. HORNE: I am kind of mixed. I can see it could be a deterrent and then again, I am not in favor it. I would not automatically --

THE COURT: You wouldn't automatically vote against it?

MS. HORNE: (Nodded in the negative.)

THE COURT: All right. Now, let me ask you this question. Because of your personal feelings that you say you have about the death penalty, would that prevent you from making a fair and impartial decision as to the issue of guilt?

MS. HORNE: No.

THE COURT: Okay. In other words, while the jury is deliberating on th[illegible] verdict, you could put out of your mind any personal feelings you had about the death penalty and reach a verdict as to guilt or innocence?

MS. HORNE: Right. (Nodded in the affirmative.)

THE COURT: You could do that even though the jury, if it returned first degree verdicts, might go into a penalty phase and the majority might recommend death and this Court might impose death, still put that out of your mind?

MS. HORNE: Right.

THE COURT: Tell us in a couple of sentences a little bit more how you feel about the death penalty?

MS. HORNE: Well, like I said, I am kind of mixed. I have religious beliefs on one side, on the other hand, I do see how it could be used as a deterrent. So --

THE COURT: Is your mind open at this point?

MS. HORNE: Pretty much, right.

THE COURT: Do you have any personal reservations about the ability to get back there and deliberate in the jury room and vote one way or the other?

MS. HORNE: No.

THE COURT: You wouldn't be a nervous Nellie and say, I can't vote?

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MS. HORNE: No.

THE COURT: All right.

Mr. Small?

MR. SMALL: Ms. Horne, you understand there is going to be, in effect, two separate deliberations. One where you determine whether or not Mr. Johnson is guilty of first degree murder. Do you understand that only if he is found guilty of first degree murder will you go into the second phase, do you understand that?

MS. HORNE: Yes.

MR. SMALL: So what Judge Powell is asking you, I want to satisfy myself and make sure you understand the questions. You get back there and according to the law he has read to you, you are sure he is guilty of first degree murder.

But in your mind, you vote yes. If I vote first degree murder he can be sentenced to death, it's pretty close to second degree murder, would you hold out to second degree?

MS. HORNE: No, because I won't be doing the sentencing.

MR. SMALL: Now, for the purposes of this question I need to assume a few things. Let's assume, first of all, you are a juror. Second of all, you have sat there throug this whole trial and you have gone through the delibera-

tions and you have found Mr. Johnson guilty of one or both counts of first degree murder.

Let's assume you have come back into the courtroom and that you have heard a number of mitigating factors on one side and the aggravating factors on the other side, and you have heard Judge Powell's instructions with regard to the factors.

Now, you go back in the jury room and in your mind you are convinced according to the law the death penalty is appropriate.

MS. HORNE: (Nodded in the affirmative.)

MR. SMALL: Could you, irrespective of how anyone else felt about it, could you yourself recommend the death penalty?

MS. HORNE: I don't think I could.

MR. SMALL: Even if you were convinced according to Judge Powell's instructions it was appropriate, you feel you could not recommend the death penalty?

MS. HORNE: I don't think I could.

THE COURT: Ma'am, really, I guess what you are saying is that you would...you could not ever vote the death penalty, recommend the death penalty no matter what the case turned out to be, is that right?

MS. HORNE: Well, I thought you said before you would do the actual sentencing.

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THE COURT: That is true.

MS. HORNE: We would try to determine guilty or not guilty.

THE COURT: If the majority of the jury recommends either death or I guess, what Mr. Small asked you and what I am asking you is, would you just, even though the jury reached a first degree verdict, would you automatically recommend life?

MS. HORNE: Yes, probably.

THE COURT: You would?

MS. HORNE: (Nodded in the affirmative.)

THE COURT: Okay.

Mr. Jones?

MR. JONES: Ms. Horne, you understand the Judge doesn't have to follow your...yours is simply a recommendation. The Judge doesn't have to follow it.

MS. HORNE: Right.

MR. JONES: But you would feel you would always recommend life no matter what the facts and circumstances are, no matter what the law is, you would always recommend life and under no circumstances could you recommend death?

MS. HORNE: It's really hard to say without the circumstances, but --

MR. JONES: Well, if you could imagine the worse

possible murder, could you recommend death in that situation?

MS. HORNE: Probably not.

MR. JONES: That is all I have, Your Honor.

THE COURT: Okay, gentlemen?

(Whereupon, counsel approached the bench and conferred off the Record.)

(Whereupon, the following was had on the Record.)

THE COURT: Ma'am, if you could step outside the room one moment with the lady bailiff.

(Whereupon, the Juror retired from the courtroom.)

MR. JONES: Your Honor, the State has announced they wish to excuse Ms. Horne for cause. We would object to the Court granting that Motion or granting an excuse for cause and state as the basis, Witherspoon and related cases that the defendant is entitled to a fair representative cross section of the community to sit on his jury. This segment of society, that is, the segment that does not believe in the death penalty and cannot impose the death sentence is in fact a viable section of our society and he should be entitled to either have, number one, of the segment on the jury or require the State to exercise a peremptory challenge.

THE COURT: I understand the law under Witherspoon and the cases following Witherspoon. If the Juror would

about the case. In a case of this type, the Court has the discretion to sequester, lock up the jury. I don't want to do that in this case, and therefore, I am relying on each individual juror to follow these instructions of the Court explicitly.

MS. YAVORSKE: Yes.

THE COURT: Thank you, ma'am. See you in the morning. Thank you for your patience.

MS. YAVORSKE: Your welcome.

THE COURT: Ms. Bowman.

MR. HINSHELWOOD: Excuse me, Your Honor, may we have a moment to confer?

THE COURT: Yes, sir.

(Whereupon, the Juror, Ms. Cutrera, entered the courtroom.)

THE COURT: Ms. Cutrera, we are calling you out of turn. Would you mind letting...would you get Ms. Bowman, we will get back to you.

MS. CUTRERA: No, not at all.

(Whereupon, the Juror, Ms. Cutrera, retired from the courtroom and the Juror, Ms. Bowman, entered the courtroom.)

THE COURT: You are Ms. Bowman?

MS. BOWMAN: Yes, sir.

THE COURT: I am going to ask you a short sequence of questions about your attitude on the death penalty. Do

not draw any inference of guilt, this is just simply crossing a bridge before we get to it, if we do.

You indicated your husband was a priest?

MS. BOWMAN: Mm-hmm.

THE COURT: Do you have any religious beliefs agains the death penalty?

MS. BOWMAN: I have to admit that I am a little bit. not quite sure.

THE COURT: Not sure about that?

MS. BOWMAN: My husband does not believe in it at all.

THE COURT: How about you personally?

MS. BOWMAN: I personally, let me say, I feel uncomfortable, if I thought anything that I said...wait a minute, if I thought my belief in a person's guilt would bring about that, that might bother me. That would bothe me.

THE COURT: Would that prevent you, assuming you wen through both phases of the case, heard all the evidence, listened to the comments of counsel, heard the Court's instructions on how to sort it out in the penalty phase, and you felt in your heart, mind and conscience the death penalty was warranted in this case; could you vote to return an advisory sentence of death, could you do that?

MS. BOWMAN: I don't think that is what I'm saying.

If it came to that, I don't think I could do that. I think I would want to...well --

THE COURT: You think then, you would automatically vote against the death penalty no matter what the facts and circumstances of this case are?

MS. BOWMAN: I think I probably would.

THE COURT: All right.

Mr. Hinshelwood?

MR. HINSHELWOOD: No questions, at this time.

MR. JONES: I appreciate the fact you do have personal feelings, we all have personal feelings. But, the criteria that we use here in the courtroom is whether or not you would be able, under your oath as a juror, to follow the law the Court will give you? If you would be able to take these personal feelings, set them aside, and follow the law that the Court gives you.

Do you think you would be able to do that or do you think your personal feelings would be so involved in trying to follow the law you wouldn't be able to do it, that you couldn't abide with your oath as a juror?

MS. BOWMAN: I need to ask you a question.

MR. JONES: Sure.

MS. BOWMAN: I think I could form an opinion as to whether a person was guilty or not guilty.

MR. JONES: Right. Okay. Even though you know if

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you found him guilty of first degree murder you might have to later decide the question of what sentence to advise, would you still be able to find him guilty of first degree murder?

MS. BOWMAN: Well, I would not be...I mean, I think that the Judge already said it would be up to the Judge to pass sentence.

MR. JONES: Final sentence?

MS. BOWMAN: So, a juror --

MR. JONES: (Interposing) Yours is an advisory sentence, the voice of the community, so to speak. After hearing all the aggravating and mitigating circumstances, the foreman will come up and say a majority of this jury recommends either death or life with no parole for twenty-five years. Now, would you be able, assuming now he has been found guilty of first degree murder, would you be able to remove your personal feelings from your consideration of what advisory sentence you would return?

Would you be able to remove your personal feelings and follow the law the Judge will give you as to what matters you are to consider?

MS. BOWMAN: I think that is a hard question. I don't think I quite understand what you are saying.

MR. JONES: What I'm trying to say, everyone has personal feelings. Do you feel your personal feelings would interfere with your following the law?

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MS. BOWMAN: In other words, I see. Okay. I don't think I would want to be responsible for a person's death.

MR. JONES: No one wants that, but we are asking you if you would be able to remove your personal feelings and follow the law even to the extent, if the law, according to what the Judge would give you, would require you return an advisory sentence of death?

MS. BOWMAN: I honestly don't think I can answer that.

MR. JONES: Well, no one else can answer it for you, so --?

MS. BOWMAN: Well, I am trying to say, I don't think I could do that.

MR. JONES: I don't have anything else, Judge.

THE COURT: All right.

(Whereupon, counsel approached the bench and conferred off the Record.)

(Whereupon, the following was had on the Record.)

THE COURT: Ma'am, we are going to excuse you. Thank you for your patience throughout this day.

Please return tomorrow at five minutes to 9:00 to the central panel jury room. Thank you.

MR. JONES: Your Honor, the same objection as before.

THE COURT: You have it in the Record.

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